

# Exhibit 6

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

-----: :  
: :  
BMG RIGHTS MANAGEMENT (US) LLC, :  
et al., :  
: :  
Plaintiffs, :  
: Case No. 1:14-cv-1611  
vs. :  
: :  
: :  
COX ENTERPRISES, INC., et al., :  
Defendants. :  
-----:

MOTIONS HEARING

December 1, 2015

Before: Liam O'Grady, USDC Judge

1 tied into the DMCA and their CATS program, showed they had the  
2 right, they had the contractual right to do it.

3 But even more than that, with respect to the ability  
4 to control, the CATS program showed that they had lots of  
5 control and that they were exercising control.

6 So we think that it's completely relevant with  
7 respect to that first element of it.

8 Then with respect to financial benefit. As you know,  
9 Your Honor, there are a couple of reasons why we think that  
10 there is financial benefit. One, of course, is what Dr. Nowlis  
11 will show, it that it is an attraction to use Cox, it enhances  
12 the value of Cox.

13 But an important element of it also, Your Honor, with  
14 respect to the financial benefit, are all these e-mails in  
15 which their employee said, well, we know these guys are  
16 infringing like mad, but, you know, they pay us 400 bucks a  
17 month, we have got to keep them.

18 Now, Your Honor, I think that is an admission of  
19 their knowledge of financial benefit and is tied completely  
20 into this overall scheme.

21 Now, Your Honor, I understand the concern about going  
22 through the 13 or 14 steps of the graduated response program.  
23 And it isn't our intention to go into that in huge detail, it  
24 isn't as relevant anymore. But on the type of level that we're  
25 talking about and the specific testimony and the e-mails

1 concerning these various elements, Your Honor, we think that  
2 it's absolutely necessary that we present this to the jury so  
3 that they see the big picture.

4           You just can't see this thing as, oh, they're getting  
5 some notices coming in that has this language in it and why Cox  
6 did what they did, unless you saw what Cox was doing with  
7 respect to everything. Because this is only one element in an  
8 entire scheme basically not to take any responsible action,  
9 Your Honor.

10           THE COURT: So you would want to put in evidence what  
11 they did with spam and other stuff, that they followed a  
12 different policy with regard to them versus DMCA notices? Are  
13 you going to anticipate going that far?

14           MR. PECAU: Well, you know, Your Honor, I mean, if we  
15 had something on a comparison between what they did with  
16 respect to, you know, a broadband violation and compared that  
17 to what they did with CATS -- I mean, the amount of testimony  
18 that would be involved in that, based on what I have seen,  
19 would be a matter of 20 minutes. I mean, it's not a central  
20 part of our case.

21           And we really don't want to go into that level  
22 because we don't think it's that relevant anymore that the DMCA  
23 defense is out.

24           What we're going to focus on really is the element of  
25 knowledge. Which we think is extraordinarily important in this

1 case for damages, for contributory infringement, and for  
2 vicarious liability.

3 Thank you, Your Honor.

4 THE COURT: Okay. All right. So that gives you a  
5 little clearer picture of what BMG would like to present.

6 MR. BRIDGES: Yes, Your Honor. And it goes to -- he  
7 has articulated something very close to what I thought their  
8 theory of the case was all along. And their theory of the case  
9 was, if you don't have a DMCA safe harbor, you are liable.

10 There is an intervening step that they have missed.  
11 Which is, they have to prove liability because section 512 is  
12 simply a damages limitation if there is liability. If there is  
13 no liability, one doesn't reach the safe harbor to begin with  
14 because it's just about remedies.

15 There are a couple of points that are very, very  
16 important here, Your Honor. I think the Court asked a question  
17 as to whether -- and there may have been statements -- or the  
18 Court may have asked Mr. Pecau, well, are you going to argue  
19 that the DMCA requires notices to be forwarded?

20 The DMCA is nothing but a safe harbor. It has no  
21 substantive obligation for a defendant whatsoever. There is no  
22 affirmative obligation. It is optional.

23 So, for example, if there is -- for people paying  
24 quarterly estimated taxes, there is a safe harbor against  
25 underpayment if you pay more than a certain amount of your

1 previous year's taxes.

2 Well, if you pay that amount, you've got your safe  
3 harbor against penalties. But if you don't owe that much tax,  
4 you didn't have to opt for that safe harbor.

5 So the point is, the safe harbor is purely optional  
6 and it is just not an affirmative obligation.

7 And the section 512, I'm sorry, I don't have the  
8 statute with me, but there is a section, if the Court reads it,  
9 it says there, it does not affect any of the substantive  
10 standards of copyright law. It doesn't change what  
11 contributory and vicarious standards are.

12 And so -- but they've always wanted to blow up this  
13 controversy about, well, you didn't handle the DMCA well, and  
14 because of that, you must be liable. But the statute, Your  
15 Honor, section 512 precludes that type of argument.

16 THE COURT: So if I understand your argument, you're  
17 not arguing that BMG doesn't have the right to introduce actual  
18 infringement testimony or evidence in Cox's files, whatever  
19 they have done. Your argument is that they don't have to  
20 reference the DMCA to prove contributory infringement or the  
21 actual knowledge necessary for infringement and then contrib?

22 MR. BRIDGES: That's it, Your Honor. And the context  
23 here started out with Mr. Vredenburg. And what I would like to  
24 point out, the evidence that they want to make about what Cox  
25 did, none of it, none of the graduated response process has

1 anything to do with any BMG or any Rightscorp notices at all  
2 because Cox merely blocked them. What Cox did in escalating  
3 people up through its various steps, Cox did that only for the  
4 notices that it got from Warner Music, from Sony, from HBO.  
5 And so, these steps are completely irrelevant to this.

6           Whether Cox forwarded notices or not, we think that's  
7 fair game. If they want to say, did Cox terminate or not --  
8 because I think they're arguing that the right and ability to  
9 control -- sorry, it's not right and ability to control. The  
10 standard in the Fourth Circuit Court under Nelson-Salabes and  
11 Humphreys is the right and ability to supervise infringing  
12 conduct, coupled with an obvious and direct financial interest  
13 in the infringing activity.

14           What the graduated response program is, they're  
15 arguing you can terminate, and that's your supervision. Well,  
16 then they can argue termination, they can argue numbers of  
17 terminations, but we don't have to go through any reference to  
18 the DMCA, and we don't have to go through all these steps.

19           THE COURT: Well, the problem in limiting it the way  
20 you would prefer is that the jury is not going to understand  
21 the context of the e-mails exchanged by Cox's employees. And  
22 they're the ones that talk about, this is our third warning.  
23 This customer has been at level 14 or 12, 13, and 14, and now I  
24 counseled him. The response is, counsel him again instead of  
25 terminating him.

1           The guy comes back and says, well, I counseled him  
2 actually last week. And so, I have done what you told me to  
3 do. Should I terminate him this time? And the answer is, no,  
4 give him another chance.

5           So the jury, in proving actual knowledge, the jury is  
6 going to need some context as to what this all means.

7           MR. BRIDGES: I understand that, Your Honor, but that  
8 context has nothing to do with these notices. It has nothing  
9 to do with this plaintiff. That context is entirely separate,  
10 a completely separate question from the question that should be  
11 here, is did Cox wrongly refuse to forward those notices? And  
12 should Cox be liable because it didn't terminate the people  
13 whom the plaintiffs want -- whom these plaintiffs wanted to  
14 terminate?

15           And why did Cox not terminate them? Well, among  
16 other reasons, it didn't even take the notices into the system.

17           What lower level Cox personnel in Hampton Roads were  
18 doing about somebody who is accused of having infringed upon  
19 Avatar five years ago in some of these e-mails and the like,  
20 Your Honor, they are a long time ago, that's the wrong --  
21 that's precisely the wrong context for the jury.

22           The context that is appropriate for this jury is what  
23 did Cox do with these notices? And why? And what was the  
24 consequence of Cox's failure to deal with these notices?  
25 That's all this case is about.



1           And the Court said last time, this is a copyright  
2     infringement case. Absolutely. And we can apply the standards  
3     from the Supreme Court in Grokster, from the Fourth Circuit in  
4     CoStar, from the Fourth Circuit in Nelson-Salabes, and address  
5     all of these issues entirely in the context of what Cox did  
6     with these notices.

7           And if they want to argue the failure to terminate  
8     based on these notices -- because what they are arguing is that  
9     they also sent Cox demands for termination and Cox didn't. Cox  
10    had no affirmative obligation to terminate anybody under the  
11    DMCA because that's just a remedies limitation at its option.

12           If it had an obligation to terminate, the law of  
13    contributory or vicarious liability would create that  
14    obligation, not the DMCA.

15           So they can make a case of you didn't forward our  
16    notices and you should have terminated 138,000 people, or  
17    500,000 people, or 78,000 people, and that's what the jury  
18    should be discussing, Your Honor.

19           Thank you.

20           MR. PECAU: Your Honor, could I respond briefly?

21           THE COURT: Yes, please, go ahead.

22           MR. PECAU: Well, not surprisingly, the defendants  
23    have described the case -- our plaintiffs' case the way the  
24    defendants would like the case to be. Well, that's fine.

25           But, Your Honor, really what this case is really

1 about is about Cox's behavior and its willfulness. And the  
2 only reason that we are looking at these issues is because it  
3 reflects what Cox's behavior is and what its willfulness is.

4 Now, with respect to --

5 THE COURT: Is it your position that the motive  
6 behind refusing to send out these notices was, it didn't want  
7 to lose customers so it wasn't even going to allow BMG's  
8 copyright notices to get to the customers and precluded it?

9 Because Mr. Bridges' point is, none of this e-mail  
10 traffic concerns Rightscorp's notices because none of them went  
11 to their customers.

12 MR. PECAU: Your Honor, I am glad you raised that  
13 because the thing is -- we are continuing to look at this from  
14 a DMCA perspective as a defense. You know, this idea of having  
15 to forward on notices and whether you're creating a safe  
16 harbor.

17 The real -- what we should really be looking at, Your  
18 Honor, is what do we have to show for contributory infringement  
19 and vicarious liability. Those two doctrines, they have been  
20 around for a long time, what they do is define when a person is  
21 liable for acts that are basically under its control.

22 THE COURT: And the opinion that I apologize for not  
23 getting you sooner, I say exactly that. You have to prove  
24 infringement. I identify half a dozen of the e-mails that show  
25 actual knowledge. You know, I find that not only actual

1 knowledge, but constructive knowledge, or willful blindness can  
2 be used to prove contributory infringement in the Fourth  
3 Circuit. And then you have the vicarious liability issue where  
4 we'll talk in a minute about the financial incentives that I  
5 may have misstated my limitation on Lehr's testimony as well  
6 and said that he couldn't talk about economic incentives. And  
7 I want to revisit that.

8 So I agree with you completely. How far do you need  
9 to go? And how are you going to use it? Because it does go to  
10 contributory infringement.

11 MR. PECAU: Right.

12 THE COURT: And you have to prove infringement. And  
13 we may have to fashion some kind of limiting instruction as to  
14 what that actual knowledge goes to.

15 MR. PECAU: Well, Your Honor, I think we have to look  
16 at it in terms of -- you know, the elements in contributory  
17 infringement and vicarious liability, we have to prove those  
18 things to show that they're responsible.

19 And if you look at the cases, Your Honor, they're not  
20 limited to the specific works at issue. They're basically  
21 looking -- they're looking at, well, for contributory  
22 infringement, they've got to know what's going on. And two,  
23 they have to materially contribute. I mean, that isn't  
24 specific to the particular, the particular works at issue.

25 The same thing for vicarious liability. Do you have

1 the right and ability to control, and are you getting a direct  
2 financial benefit? That's what all the cases are looking at.

3 So what we're arguing, Your Honor, and what our whole  
4 focus on in our case is not on the DMCA anymore per se. Our  
5 focus is on, what was their behavior? Right. What were they  
6 doing? Were they violating the law of contributory  
7 infringement and vicarious liability? That's our entire focus.

8 THE COURT: And they use the response to the  
9 settlement offers as a reason not to follow through with their  
10 customers, and they had an economic benefit as a result of not  
11 terminating any customers, is that your argument?

12 MR. PECAU: That's part of it, Your Honor. You know,  
13 as we've indicated -- we've indicated many times before, we  
14 think it's part of a whole scheme to avoid their responsibility  
15 under contributory infringement and vicarious liability  
16 principles. That's our whole thing.

17 Now, it isn't a matter of whether they forwarded it  
18 on to something. It's a matter of whether once they got  
19 notice, did they do what was required under the law?

20 And our argument is, Your Honor, all of these e-mails  
21 and all of these actions are directly on point. That's  
22 basically it.

23 THE COURT: But they did follow through in sending  
24 notices to some customers, right? Where does that fit into  
25 your theory?

1 MR. PECAU: Well, Your Honor -- well, it doesn't fit  
2 into our theory at all because we --

3 THE COURT: Well, how do you deal with that?

4 MR. PECAU: Are we going to deal with that? Well,  
5 Your Honor, the way we're going to deal with it is we're going  
6 to say that under principles of vicarious infringement and  
7 contributory infringement, is that when they got notices of  
8 these things, they had to act upon it. They had to act  
9 responsibly.

10 And they had all kinds of choices. They could have  
11 sent out their own notice. They could have ripped out whatever  
12 they didn't like in our notice. They could have forwarded our  
13 own notices. But they didn't choose any of the responsible  
14 actions. What they said is, our way or the highway.

15 And, Your Honor, we don't think that that's -- that  
16 there is any basis that they can take that position.

17 Now, you know, they can argue willfulness, and we  
18 don't know how they are going to argue --

19 THE COURT: Mr. Bridges' statement is that the safe  
20 harbor is just a damages issue. They don't have to opt into  
21 the safe harbor. And they don't need to issue notices to  
22 customers if they choose not to.

23 MR. PECAU: I agree, Your Honor.

24 THE COURT: And it's still your burden.

25 MR. PECAU: I agree, Your Honor. Safe harbor is a

1 defense that is out of the case. But it is still part of the  
2 case of whether they are contributorily infringing or they are  
3 in vicarious liability. And their behavior, their conduct and  
4 their willfulness, is all part of the fabric of the case and it  
5 all fits together. You just can't -- you can't take reality  
6 out of this case and then try to put something to the jury.  
7 They will have no clue as to what's going on. And it doesn't  
8 really reflect the reality of what has happened or why we  
9 believe that they are liable.

10 THE COURT: Okay.

11 MR. BRIDGES: Your Honor, the irony is not lost on me  
12 that they asked for the DMCA to be out of this case. And they  
13 got what they asked for. And now they're saying, oh, but we  
14 want it to be out of the case for any purpose that benefits  
15 them, but we still want to use it as a sword, and they don't  
16 get a shield.

17 Your Honor, that makes no sense as an approach. It's  
18 not an intellectually honest approach. If they wanted it in,  
19 it should have been in. And if they wanted it out, it should  
20 be out. And we believe Your Honor's ruling is that it is out.

21 They are trying to say, essentially, they did us  
22 wrong, they did us wrong, because they did other copyright  
23 holders wrong. And they did us wrong in a different way  
24 because they wouldn't even accept our notices. And so, we want  
25 to show how they did every other copyright holder wrong by not

1 implementing their graduated process correctly.

2 And, Your Honor, that's evidence of unrelated conduct  
3 that is irrelevant to this. The question is, were they harmed  
4 by this failure?

5 I need to say one thing, Your Honor. I'm sure that  
6 the water may be under the bridge on this, but I have been  
7 talking about knowledge a little bit, and I have talked about  
8 it in the past. When time comes to discuss the jury  
9 instructions, we believe that there is a sharp divide here in  
10 terms of what the appropriate standard is for contributory  
11 infringement.

12 And I will just zoom back for a bit. Vicarious  
13 liability is about a particular relationship. Contributory  
14 infringement is about culpable behavior. And I don't believe  
15 they mentioned in their jury instructions, they may have, but I  
16 don't think so, the Grokster decision is the latest decision on  
17 contributory. And it distinguished the Sony decision of the  
18 Supreme Court. Those are the two landmarks of contributory  
19 which establish the two essential branches of contributory.

20 And the Sony case, as Justice Ginsberg explained in  
21 the Grokster concurrence where she sort of set out the whole  
22 framework, she said, you're liable because you're providing a  
23 product that is devoted to infringement. That's one path. The  
24 other path is, you're liable for intentionally -- for  
25 intentionally inducing infringement.

1           And in the majority opinion, I think it was unanimous  
2 on this part in Grokster, the Court said, mere knowledge of  
3 actual infringing uses is not enough. Mere knowledge of actual  
4 infringing uses is not enough. Those words are in the statute.

5           So this is a little bit of a detour. We knew that  
6 they were going to avoid Grokster on the summary judgment  
7 motion. We knew they were going to avoid it. So we did some  
8 argument about the argument we thought that they were going to  
9 resort to. But I just want to emphasize to the Court that the  
10 correct standard is the Supreme Court standard.

11           And you will discover in their jury instructions that  
12 they tend to resort to Ninth Circuit law a lot. Now, we're  
13 from California, we would have been happy to have tried this  
14 case in California, Your Honor, under the Ninth Circuit, but  
15 this case got filed here. And we think the Supreme Court and  
16 the Fourth Circuit in CoStar and Nelson-Salabes should apply.

17           So I just want to make those cases.

18           One thing I noticed, the Court seems to be revisiting  
19 a couple of the decisions on this. We think the DMCA should be  
20 out. But if the DMCA in any respect comes in, then I think we  
21 absolutely need to show that Cox's response to Rightscorp was  
22 echoed by Charter, by Suddenlink, by Clearwire, by AT&T, by  
23 Verizon.

24           The Court had a question at one of the earlier  
25 hearings, what do other ISPs do? So to me, Your Honor, if they



1 want to use DMCA processes for other copyright complainants,  
2 then it would be equally fair game to bring in other ISP  
3 responses to these notices.

4 So there just needs to be a basic balance here. And  
5 what they're asking for is a completely imbalanced outcome,  
6 Your Honor.

7 Thank you.

8 THE COURT: Well --

9 MR. PECAU: Your Honor, I don't want to reargue the  
10 motion for summary judgment. I just want to make a point on  
11 what I think we're talking about.

12 THE COURT: Go ahead, one point.

13 MR. PECAU: And it's going to be very quick.

14 Your Honor, what they're trying to do is use this  
15 whole thing, the DMCA, as a sword and a shield. So basically  
16 what they want to do is --

17 THE COURT: You're in agreement then.

18 MR. PECAU: I am in agreement with that, Your Honor.  
19 Basically what they want to do is to be able to say that, you  
20 know, we acted responsibly. But the fact is that we should be  
21 able to show that they irresponsibly.

22 And the thing is that then they say, well, you know,  
23 we want to show that they were treated like everyone else. If  
24 they want to show that they were treated -- that we would be  
25 treated like everyone else if we went into their program, well,

1 the result of going into their program is that you're not being  
2 treated responsibly, Your Honor.

3 It all goes to this entire scheme that they've put  
4 together and to their willfulness.

5 THE COURT: Okay. All right. Well, I'm going to  
6 allow BMG to put on its theory of the case. And as promised,  
7 we're not going to harp on the 14 steps to termination. But I  
8 think that for purposes of contributory infringement, actual  
9 knowledge is BMG's burden. All of the e-mails, even though  
10 they are not of BMG clients, go to the actual knowledge of the  
11 program and the fact that Cox was not going to follow it. And  
12 they weren't going to follow it because they didn't want to  
13 lose customers. And it also clearly goes to the financial  
14 incentive to keep the customers and, therefore, is highly  
15 relevant to vicarious liability.

16 Whether the safe harbor defense exists or doesn't  
17 exist doesn't change plaintiffs' burden to prove direct  
18 infringement and then contributory or vicarious liability or  
19 both. And that's why there is 40 cases to read on every one of  
20 these issues. It's because the courts have allowed plaintiffs  
21 to put in the evidence of what the defendant did with regard to  
22 the DMCA and its obligation under the DMCA to or not to avoid  
23 the liability issue. And so, I think it is relevant.

24 As to what other ISPs did, I will continue to think  
25 about that now that you've brought it up and we've talked here